

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INSTITUTE OF CETACEAN RESEARCH, et al.,

CASE NO. C11-2043JLR

ORDER

Plaintiffs,

V.

SEA SHEPHERD CONSERVATION
SOCIETY, et al.,

Defendants.

I. INTRODUCTION

17 This matter comes before the court on Plaintiffs The Institute of Cetacean
18 Research (“the Institute”), Kyodo Senpaku Kaisha, Ltd., and Tomoyuki Ogawa’s
19 (collectively, “Plaintiffs”) motion to dismiss with prejudice three of Defendants Sea
20 Shepherd Conservation Society (“SSCS”) and Paul Watson’s (collectively,

21 //

22 //

1 “Defendants”) four counterclaims.¹ (Mot. (Dkt. # 304); *see also* 3d Amended
 2 Counter-Complaint (“3ACC”) (Dkt. # 297).) Defendants oppose that motion (Resp.
 3 (Dkt. # 311)), and Plaintiffs have filed a reply memorandum (Reply (Dkt. # 312)).
 4 Having considered the submissions of the parties, the appropriate portions of the record,
 5 and the relevant law,² the court DENIES Plaintiffs’ motion to dismiss and ORDERS
 6 Defendants to show cause as discussed more fully herein.

7 **II. BACKGROUND**

8 This is a case between Antarctic whalers and environmentalists who oppose
 9 whaling. The parties seek damages and injunctive relief related to past, present, and
 10 future actions of allegedly perpetrating and funding piracy and unsafe navigation in the
 11 Southern Ocean.

12 **A. Procedural Posture**

13 In 2013, the Ninth Circuit granted Plaintiffs preliminary injunctive relief against
 14 Defendants’ acts of piracy and unsafe navigation. *See Inst. of Cetacean Research v. Sea*
15 Shepherd Conservation Soc'y, 708 F.3d 1099, 1106 (9th Cir. 2013); *Inst. of Cetacean*
16 Research v. Sea Shepherd Conservation Soc'y (Cetacean I), 725 F.3d 940 (9th Cir. 2013)
 17 (amending and superseding 708 F.3d 1099). The preliminary injunction bars Defendants
 18 from “physically attacking any vessel engaged by Plaintiffs . . . in the Southern Ocean . . .

19 ¹ Plaintiffs are also counterclaim defendants and Defendants are also counterclaim
 20 plaintiffs. For simplicity, the court refers to the parties based on the initial claim filed. (*See*
 21 *Compl.* (Dkt. # 1)); *see also infra* § III.B.3. (explaining the status of Counterclaim Defendant
 22 Hiroyuki Komura, who is neither a plaintiff in this action nor a movant to the instant motion).

² The court concludes oral argument is not necessary to rule on Plaintiffs’ motion. *See*
 Local Rules W.D. Wash. LCR 7(b)(4).

1 or from navigating in a manner that is likely to endanger the safe operation of any such
 2 vessel.” *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y (Cetacean*
 3 *Injunction)*, 702 F.3d 573, 573 (9th Cir. 2012); *Cetacean I*, 725 F.3d at 947 (ordering that
 4 the Ninth Circuit’s injunction pending appeal in *Cetacean Injunction* “remain in effect
 5 until further order of” the Ninth Circuit). Furthermore, Defendants are “[i]n no event” to
 6 “approach [P]laintiffs any closer than 500 yards when [D]efendants are navigating on the
 7 open sea.” *Id.*

8 On June 30, 2015, Defendants filed a second amended counter-complaint against
 9 Plaintiffs and Hiroyuki Komura. (*See* 2d Am. Counter-Complaint (“2ACC”) (Dkt.
 10 # 250).)³ Two of the six counterclaims alleged therein sought injunctive relief for
 11 Plaintiffs’ alleged whaling and three sought injunctive relief for Plaintiffs’ alleged
 12 perpetration and financing of piracy and unsafe navigation. (*Id.*) On December 21, 2015,
 13 the court dismissed Defendants’ whaling counterclaims for lack of subject matter
 14 jurisdiction and failure to state a claim and dismissed Defendants’ piracy and unsafe
 15 navigation counterclaims for lack of standing. (*See* 12/21/15 Order (Dkt. # 294) at
 16 38-49.) The court granted Defendants leave to file a third amended counter-complaint,
 17 and Defendants timely did so on January 20, 2016. (3ACC.)

18 //

19 //

20

21 ³ Defendants’ second amended answer and second amended counter-complaint were filed
 22 conjunctively and paragraph numeration restarts in the section stating counterclaims.
 Accordingly, the court refers to the second section of that filing as the second amended
 counter-complaint and cites it accordingly. (*See* 2ACC ¶¶ 1-100, at 16-45.)

1 **B. Defendants' Factual Allegations**

2 Defendants omit their whaling counterclaims from their third amended
 3 counter-complaint. (*See generally* 3ACC.) However, Defendants contend they have
 4 remedied the pleading deficiencies in their piracy and unsafe navigation counterclaims.
 5 (*See generally* Resp.) Plaintiffs disagree and move to dismiss Defendants' injunctive
 6 counterclaims with prejudice. (Mot. at 2, 11.) The basic timeline of Defendants'
 7 allegations has not changed from those set forth in their second amended
 8 counter-complaint.⁴ (*Compare* 2ACC with 3ACC.) However, Defendants have amended
 9 their counter-complaint to provide greater specificity as to the past and future actions
 10 taken by the parties—and several non-parties—in the Southern Ocean.

11 Defendants first clarify the difference between Sea Shepherd, “a loosely organized
 12 global conservation movement” consisting of “independent entities in other countries,”
 13 and SSCS, “a non-profit organization” based in Oregon whose mission is “to end the
 14 destruction of habitat and slaughter of wildlife in the world’s oceans.” (3ACC ¶¶ 3-4.)
 15 Although SSCS inspired Sea Shepherd and is among Sea Shepherd’s member entities,
 16 Sea Shepherd also includes foreign entities with “independent boards, officers, staff, and
 17 finances.”⁵ (*Id.* ¶ 4.) SSCS is the only Sea Shepherd entity that is a party to this suit.

18
 19 _____

20 ⁴ The court provided an extensive summary of those factual allegations and a procedural
 21 history of this case in its order dismissing Defendants’ second amended counterclaims.
 22 (12/21/15 Order at 4-8.)

23 ⁵ The court adopts Defendants’ delineation between SSCS and Sea Shepherd for purposes
 24 of this order.

1 Mr. Watson founded SSCS, previously served as its executive director, and is now a
2 “strategic advisor to the SSCS board.” (*Id.* ¶ 5.)

3 After the Ninth Circuit issued its preliminary injunction, “SSCS withdrew from
4 participation in the Southern Ocean whale-protection campaigns, and has not participated
5 in their planning, management, funding, or execution since its withdrawal.” (*Id.* ¶ 50.)
6 However, Defendants “plan to return to the Southern Ocean, beginning in the 2016-2017
7 season, to conduct campaigns to monitor, research, and protect the vital krill population,
8 and to seek out, monitor, document, and expose poaching activities, including unlawful
9 whaling by” Plaintiffs and Mr. Komura. (*Id.* ¶¶ 7, 52.) Defendants intend to do so while
10 abiding by the injunction. (*Id.* ¶ 52.)

11 Defendants allege that the Institute has “repeatedly launched attacks upon . . . Sea
12 Shepherd vessels and crew” and that at least some of these attacks have occurred “when
13 the Sea Shepherd vessels have not been engaged in efforts to impede [the Institute]’s
14 whaling or otherwise posed any threat to the whaling fleet.” (*Id.* ¶ 53.) Defendants assert
15 that the Institute’s vessels have “tracked down and chased Sea Shepherd vessels across
16 long distances” to launch these attacks. (*Id.*) Examples of the Institute’s behavior, as
17 proffered by Defendants, include: launching “unprovoked attacks against SSCS’s
18 helicopter,” which has “never engaged in any act of aggression against any whaling
19 vessel, participated in any operations that endangered [the Institute’s fleet’s] safe
20 navigation or the safety of the crew, or made any direct attempt to impede their illegal
21 whaling” (*id.* ¶ 58); “pursuing the STEVE IRWIN for approximately two weeks” and
22 using long-range acoustic devices and dangerous navigation tactics to force the ship to

1 return to port (*id.* ¶ 61; *see also id.* ¶¶ 72 (alleging a similar event in 2012, several years
 2 later), 82 (alleging a similar event in 2014); 86 (alleging a similar pursuit over the course
 3 of six weeks in 2008)); deliberately ramming the ADY GIL (*id.* ¶ 62) and the BOB
 4 BARKER (*id.* ¶ 65); “pursuing and approaching smaller Sea Shepherd vessels in an
 5 aggressive manner” (*id.* ¶¶ 68, 71); and attempting to foul the rudders and propellers of
 6 the BOB BARKER (*id.* ¶ 75). Although SSCS ceased its direct involvement in the
 7 Southern Ocean in 2012, Defendants allege that the events above took place as late as
 8 2014 against foreign Sea Shepherd entities. (*Id.* ¶ 82.)

9 Based on the Institute’s history of indiscriminate aggression towards SSCS and
 10 similar entities and Defendants’ intention to continue to monitor krill and poaching in the
 11 Southern Ocean, Defendants allege that similar violent encounters are likely to occur in
 12 the future, notwithstanding SSCS’s professed intention to abide by the injunction. (*Id.*
 13 ¶¶ 52, 84-88.) Defendants therefore seek injunctive relief against Plaintiffs and Mr.
 14 Komura for acts of piracy (*id.* at 89-96), acts of unsafe navigation on the high seas (*id.* at
 15 97-100), and funding piracy and unsafe navigation (*id.* at 97-109).⁶ Plaintiffs’ motion to
 16 dismiss these three counterclaims is now before the court. (*See generally* MTD.)

17 //

18 //

19 //

20 //

21

22 ⁶ Defendants also counterclaim for intentional and/or negligent destruction of property
 (3ACC ¶¶ 110-16), which Plaintiffs have not moved to dismiss (*see* MTD at 2).

III. ANALYSIS

A. Legal Standards

1. Under Rule 12(b)(1)

A motion to dismiss for lack of subject matter jurisdiction is either facial or factual. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* The court accepts the factual allegations in the complaint as true, and the nonmoving party is entitled to have those facts construed in the light most favorable to it. *Fed’n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). However, if the moving party “convert[s] the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)). In either instance, the party asserting its claims in federal court bears the burden of establishing subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

2. Under Rule 12(b)(6)

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.

1 2005). The court must accept all well-pleaded allegations of material fact as true and
 2 draw all reasonable inferences in favor of the plaintiff. *See Wyler Summit P'ship v.*
 3 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). “To survive a motion to
 4 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a
 5 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
 6 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus*
 7 *VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). “A claim has facial plausibility
 8 when the plaintiff pleads factual content that allows the court to draw the reasonable
 9 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663.

10 The court, however, need not accept as true a legal conclusion presented as a
 11 factual allegation. *Id.* at 678. Although the pleading standard announced by Federal
 12 Rule of Civil Procedure 8 does not require “detailed factual allegations,” it demands more
 13 than “an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citing
 14 *Twombly*, 550 U.S. at 555). A pleading that offers only “labels and conclusions or a
 15 formulaic recitation of the elements of a cause of action” will not survive a motion to
 16 dismiss under Federal Rule of Civil Procedure 12(b)(6). *Id.*

17 **B. Plaintiffs' Motion to Dismiss**

18 Plaintiffs argue that Defendants' injunctive counterclaims are subject to dismissal
 19 on several bases. First, Plaintiffs contend that Defendants' operative allegations fail to
 20 give rise to a plausible inference of “imminent injury” and that Defendants therefore lack
 21 standing. (Mot. at 5-8.) Second, Plaintiffs contend that Defendants fail to state claims
 22 for piracy, unsafe navigation, and financing piracy and unsafe navigation because

1 Defendants fail to allege that they have any ships. (*Id.* at 8-9.) Third, Plaintiffs contend
 2 that the act of state doctrine precludes Defendants' piracy counterclaim. (*Id.* at 9-11.)

3 1. Standing

4 In its December 21, 2015, order, the court concluded that Defendants had
 5 inadequately alleged standing. (12/21/15 Order at 42-45.) The court principally based
 6 this determination on Defendants' characterizations of their nautical interactions with
 7 Plaintiffs. (*See id.*) Even when construed in the light most favorable to Defendants, the
 8 second amended counter-complaint allowed only for the inference that Defendants
 9 initiated proximity with Plaintiffs and not vice-versa. (*Id.*) Proximity is a prerequisite to
 10 the past injuries Defendants alleged and the future injuries Defendants sought to enjoin,
 11 which included ramming, fouling rudders and propellers, and throwing projectiles. (*See*
 12 *id.* at 42-43.) Accordingly, the court concluded that Defendants' allegations did not
 13 support a plausible inference of imminent injury to Defendants and that Defendants
 14 therefore lacked standing to seek injunctive relief.⁷ (*Id.* at 44-45.)

15 In granting leave to amend, the court cautioned Defendants that any amended
 16 counterclaims "should be clear what past and future events involve SSCS entities as
 17 opposed to Sea Shepherd entities, because Defendants have not demonstrated a basis for
 18 standing as it relates to Sea Shepherd." (12/21/15 Order at 51.) Plaintiffs argue that
 19

20 7 The court also noted that Defendants sought injunctive relief as to "Sea Shepherd
 21 vessels, and not SSCS vessels," but "provided no reason SSCS would have standing to sue for
 22 actions taken against Sea Shepherd vessels." (12/21/15 Order at 42 (citing 2ACC ¶¶ 74, 86).)
 Defendants addressed this deficiency by amending their counter-complaint to eliminate
 references to Sea Shepherd in their plea for relief. (*Compare* 2ACC ¶¶ 74, 86 with 3ACC ¶¶ 96,
 100.)

1 rather than heed the court's warning, Defendants' third amended counterclaims merely
2 convolute which Sea Shepherd entities—SSCS or one of Sea Shepherd's foreign
3 affiliates—were involved in past confrontations and will be involved in future campaigns.
4 (Mot. at 5-7.) The court disagrees and concludes that Defendants' operative
5 counter-complaint adequately pleads standing.

6 As the parties invoking jurisdiction over their counterclaims, Defendants bear the
7 burden of establishing standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).
8 However, at the motion to dismiss stage, "general factual allegations of injury resulting
9 from [Plaintiffs'] conduct" may suffice, *id.*, because the court "presumes that general
10 allegations embrace those specific facts that are necessary to support the claim," *Lujan v.*
11 *Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990); *see also Defs. of Wildlife*, 504 U.S. at
12 561 ("[E]ach element [of standing] must be supported in the same way as any other
13 matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree
14 of evidence required at the successive stages of the litigation."); *Lucas v. S.C. Coastal*
15 *Council*, 505 U.S. 1003, 1014 n.3 (1992) ("*Lujan*, since it involved the establishment of
16 injury in fact at the *summary judgment* stage, required specific facts to be adduced by
17 sworn testimony; had the same challenge to a generalized allegation of injury in fact been
18 made at the pleading stage, it would have been unsuccessful."); *Levine v. Vilsack*, 587
19 F.3d 986, 996-97 (9th Cir. 2009) ("[A] court's obligation to take a plaintiff at its word at
20 [the motion to dismiss] stage in connection with Article III standing issues is primarily
21 directed at the injury in fact and causation issues.").

1 Defendants allege plans to return to the Southern Ocean in the upcoming whaling
2 season and beyond. (3ACC ¶¶ 7, 52.) During those campaigns, Defendants will “seek
3 out, monitor, document, and expose” what Defendants view as poaching activities,
4 including the whaling performed by Plaintiffs. (*Id.*) Although Defendants pledge to
5 abide by the injunction (*id.* ¶ 52), their observational mission will no doubt lead them to
6 the edge of the injunctive barrier. The operative allegations assert that the Institute has,
7 at times, sought out and pursued vessels operated by Sea Shepherd and other
8 environmentalist organizations. (*Id.* ¶¶ 58, 61-62, 65, 68, 71-72, 82, 86; *cf.* 12/21/15
9 Order at 42 (“[T]he court cannot reasonably infer from Defendants’ allegations that
10 Plaintiffs have ever sought out Defendants on the high seas to commit acts of piracy or
11 unsafe navigation. Indeed, Defendants repeatedly make clear that Defendants initiated
12 proximity, not Plaintiffs.”).) These allegations support the conclusion that Defendants
13 face “imminent injury” at the hands of Plaintiffs.

14 Plaintiffs principally argue that Defendants insufficiently plead imminent injury
15 because Defendants “do not allege how they will get” to the Southern Ocean. (Mot. at 6.)
16 However, Defendants’ allegation that they intend to return to the Southern Ocean is
17 exactly the type of “general allegation[]” that “embrace[s] those specific facts that are
18 necessary to support the claim.” *Nat’l Wildlife Fed’n*, 497 U.S. at 889. In light of
19 Defendants’ history of activity on the Southern Ocean, it requires only a small inference
20 to reason that Defendants own or plan to otherwise—in the words of the Ninth Circuit—
21 “engage[]” one or more vessels. *Cetacean Injunction*, 702 F.3d at 573. If factual
22 development undermines that conclusion, the court can determine as much when

1 engaging in more exacting scrutiny at the summary judgment stage. *See* *Defs. of*
2 *Wildlife*, 504 U.S. at 561 (citing Fed. R. Civ. P. 56(e)) (differentiating evaluating standing
3 on the pleadings from analyzing standing on a motion for summary judgment, at which
4 point the claimant can no longer rest on “mere allegations,” but must “set forth” specific
5 facts supporting standing by affidavit or other evidence).

6 Plaintiffs’ other standing arguments are also unavailing. Plaintiffs argue that
7 Defendants dropped and now contradict their previous allegation that Plaintiffs’ actions
8 at sea were “in response to” Defendants’ efforts to expose and impede Plaintiffs’
9 whaling. (Mot. at 7-8.) According to Plaintiffs, the court would not have granted
10 Defendants leave to amend in the first place if it had known Defendants intended to do so
11 by way of inconsistent pleading. (*Id.* (citing *United States v. Corinthian Colls.*, 655 F.3d
12 984, 995 (9th Cir. 2011)).) However, the court finds Defendants’ operative allegations to
13 clarify, rather than contradict, their prior counter-complaint. (*See* Resp. at 8 n.6.)
14 Accordingly, the court rejects this argument.

15 Finally, Plaintiffs contend that Defendants’ allegations do not give rise to a
16 “plausible inference that Plaintiffs would risk the benefit of the Injunction to engage in
17 unprovoked attacks on an SSCS ship peaceably obeying the Injunction that Plaintiffs
18 fought so hard to secure from this Court for their protection.” (Mot. at 7.) However,
19 Defendants allege that the Institute does not discriminate as to whose intermeddling ships
20 it targets with aggression. (3ACC ¶¶ 55, 84, 86-87.) These allegations support the
21 inference that past acts against foreign Sea Shepherd entities are predictive of similar acts
22

1 in the future against SSCS, even when SSCS is obeying the injunction. Defendants need
 2 not allege more to adequately plead imminent injury.

3 In light of the parties' past interactions, Defendants' professed intent to return to
 4 the edge of the injunctive border in the Southern Ocean, and the low threshold for
 5 alleging imminent injury, the court denies Plaintiffs' motion to dismiss Defendants'
 6 injunctive counterclaims for lack of standing.⁸

7 **2. Failure to State a Claim**

8 *a. Failure to Allege Ships*

9 Plaintiffs next argue that Defendants fail to state a claim as to all three injunctive
 10 counterclaims because they fail to allege that they have ships. (Mot. at 8-9.) For the
 11 reasons articulated above, *see supra* § III.B.1., the court rejects Defendants' argument
 12 that the failure to allege possession of or access to ships renders deficient Defendants'
 13 injunctive counterclaims. Defendants need not allege every discrete fact relevant to their
 14 claims to support a plausible inference that those claims have merit. *See Iqbal*, 556 U.S.
 15 at 678. The parties' past actions and Defendants' future plans in the Southern Ocean
 16 sufficiently support the inference that Defendants will take the specific steps necessary to
 17 again engage and utilize ships in the Southern Ocean during coming whaling seasons.

18 //

19 //

20

21 ⁸ Plaintiffs challenge only whether Defendants have sufficiently alleged the "imminent
 22 injury" element of standing, and the court finds no reason to question the presence of any other
 element or sub-element of Defendants' standing to sue Plaintiffs. *Cf. infra* § III.B.3. (raising *sua
 sponte* Defendants' standing to assert injunctive counterclaims against Mr. Komura).

1 b. *Act of State Doctrine*

2 Plaintiffs also argue that Defendants' piracy counterclaim is subject to dismissal
 3 because it is barred by the act of state doctrine. (*Id.* at 9-11.) Piracy, as defined in the
 4 United Nations Convention on the Law of the Sea ("UNCLOS"), consists of "illegal acts
 5 of violence or detention, or any act of depredation, committed for private ends by the
 6 crew or the passengers of a private ship . . . and directed . . . on the high seas, against
 7 another ship . . . or against persons or property on board such ship." United Nations
 8 Convention on the Law of the Sea [*hereinafter* UNCLOS] art. 101, Dec. 10, 1982, 1833
 9 U.N.T.S. 397; *Cetacean I*, 725 F.3d at 943 (citing UNCLOS art. 101) (excerpting the
 10 quoted language); *see also United States v. Ali*, 982 F. Supp. 2d 85, 88 (D.D.C. 2013)
 11 (citing UNCLOS art. 101 and 18 U.S.C. § 1651) (articulating the elements for the crime
 12 of piracy, pursuant to the law of nations, as "(1) the crew or passengers of a private ship
 13 (2) commit an illegal act of violence, detention, or depredation (3) on the high seas (4)
 14 against another ship or persons or property on board that ship (5) for private ends").

15 Defendants allege that Plaintiffs commit acts of piracy in furtherance of the
 16 "private end[]" of "illegal, private commercial whaling activities." (3ACC ¶ 94.)
 17 However, pursuant to Article VIII of the International Convention for the Regulation of
 18 Whaling, Japan has issued the Institute a "special permit," which authorizes a limited
 19 amount of lethal whaling for purposes of scientific research. (*Id.* ¶¶ 15-18.) Plaintiffs
 20 construe Defendants' piracy counterclaim as implicitly challenging the validity of Japan's
 21 special permit by positing that Plaintiffs' whaling is "illegal" and "commercial." (See
 22 Mot. at 11; Reply at 8-9.) Plaintiffs contend that the act of state doctrine bars such a

1 claim because that doctrine requires the court to “respect . . . Japan’s issuance of special
 2 permits to Plaintiffs in Japan allowing lethal take of whales under Japan’s new research
 3 program.” (Mot. at 11.) The court finds this argument to be premised on an overly
 4 narrow understanding of the term “private ends.”

5 In the context of a piracy claim, an act taken for a “private end” is one “not taken
 6 on behalf of a state.” *Cetacean I*, 725 F.3d at 944; *see also* Michael Bahar, *Attaining*
 7 *Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy*
 8 *Operations*, 40 Vand. J. Transnat'l L. 1, 30 (2007) (“‘For private ends’ must be
 9 understood to distinguish between state-sponsored piracy or privateering, which could be
 10 redressed under the laws of war, and piracy, which could not. Again, essential to piracy’s
 11 definition is not the actor’s intent, but whether any state can be held liable for the actor’s
 12 actions.”). This definition of “private ends” is broader than the one Defendants embrace
 13 in their counterclaims and Plaintiffs advocate in their motion to dismiss. (*See* 3ACC ¶ 94
 14 (“These acts of violence are committed for ‘private ends’ in that they are in furtherance
 15 of the illegal, private commercial whaling activities of [the Institute] and Kyodo
 16 Senpaku.”); Mot. at 9-10 (citing 3ACC ¶ 94); *but see* Resp. at 14 n.12 (quoting
 17 *Cetacean I*, 725 F.3d at 944).)

18 The “private ends” element of piracy was intended to carve out acts of warfare—
 19 the archetypal “public end”—and analogous behavior, not to limit piracy’s applicability
 20 to ends “pursued for ‘financial enrichment.’” *Id.* at 943. For example,

21 [t]he fact that a raider may intend to give away his booty like Robin Hood
 22 does not render his actions “for a public end” any more than would a
 fundamentalist’s hijacking a vessel in the name of his organization, no

1 matter how political that organization. An eco-warrior who hobbles an oil
 2 tanker may say that he is working for the world public, but has that public
 3 authorized him to do so? No. All three are acting as individuals, not as
 4 states empowered with the ability to declare war.

5 Bahar, *supra*, at 32. Here, Japan has merely issued the Institute a special permit to
 6 perform lethal whaling. (3ACC ¶ 20.) That action alone does not render Plaintiffs'
 7 whaling an act taken "on behalf of" Japan in the sense that a warship acts "on behalf of"
 8 its country. *Cetacean I*, 725 F.3d at 944.

9 Although an action taken for a scientific purpose, as Japan characterizes Plaintiffs'
 10 lethal whaling, benefits the public, concluding that it therefore does not constitute a
 11 private end would embrace a narrower definition of "private ends" than applies here. *See*
 12 *Cetacean I*, 725 F.3d at 944 ("That the perpetrators believe themselves to be serving the
 13 public good does not render their ends public."). Plaintiffs therefore err in arguing that
 14 "[i]f Plaintiffs' activity is research whaling, then it is not the 'private end' of commercial
 15 whaling."⁹ (Reply at 9.) Even assuming the act of state doctrine forecloses Defendants
 16 from assailing the merits of Japan's special permit, Defendants' counterclaims

17 ⁹ Defendants raise this argument in their briefing. (Resp. at 14 & n.12.) Plaintiffs decline
 18 to address the argument because "that is decidedly *not* the theory of [Defendants'] case,"
 19 Defendants would "never accept the premise that Plaintiffs engage in research whaling," and
 20 "Defendants would not advance that theory because that would eliminate their claimed basis for
 21 discovery 'behind the permit.'" (Reply at 8 n.3.) Especially at the pleading stage, Defendants
 22 are not required to articulate a precise theory of their case, nor must Defendants philosophically
 23 embrace the basis upon which their claims may proceed.

24 As to the scope of discovery "behind the permit," the court finds no basis to question its
 25 prior rulings. (See 4/22/15 Hearing Tr. (Dkt. # 323) at 30:12-31:1.) The court concludes herein
 26 that of the several grounds on which Defendants satisfactorily allege "private ends," profiteering
 27 is only one, and it is unnecessarily narrow and legally uncertain. This conclusion supports
 28 foreclosing discovery "behind the permit" because that information is of, at most, minimal
 29 relevance and not proportional to the needs of this case. *See* Fed. R. Civ. P. 26(b)(1).

1 sufficiently allege “private ends” as that term pertains to piracy. Defendants therefore
 2 state a piracy counterclaim irrespective of the merits of Plaintiffs’ act of state doctrine
 3 argument.¹⁰

4 Accordingly, the court denies Plaintiffs’ motion to dismiss Defendants’ injunctive
 5 counterclaims for failure to state a claim.

6 3. Counterclaim Defendant Hiroyuki Komura

7 Mr. Komura is not a plaintiff in this action and has not joined in Plaintiffs’ present
 8 motion to dismiss. (*See* 1st Am. Compl. (“FAC”) (Dkt. # 234); 3ACC ¶¶ 1, 10 (alleging
 9 Mr. Komura was the master of the SHONAN MARU NO. 2 when it collided with the
 10 ADY GIL in 2010); Mot at 1.) As of December 21, 2015, Defendants had not served Mr.
 11 Komura. (12/21/15 Order at 51.) At that time, the court denied Mr. Komura’s motion to
 12 dismiss Defendants’ counterclaims against him for lack of service. (12/21/15 Order at 50
 13 (reasoning that Federal Rule of Civil Procedure 4(m) “does not set a deadline for service
 14 in a foreign country”)). However, the court ordered Defendants to “effect service on Mr.
 15 Komura by April 30, 2016,” or to “file a status report detailing their efforts to serve Mr.
 16 Komura, at which point the court may revisit whether dismissal is appropriate for failure
 17 to serve.” (*Id.* at 51.) Defendants have filed neither proof of service nor a status report
 18 on the issue of service. (*See* Dkt.)

19
 20
 21

 22 ¹⁰ In this order, the court assumes that the act of state doctrine renders unassailable
 Japan’s conclusion that Plaintiffs’ whaling is for scientific purposes, but the court expresses no
 opinion on the merits of that argument.

1 Furthermore, it is not clear on what basis Defendants have constitutional standing
 2 to pursue prospective relief against Mr. Komura.¹¹ Mr. Komura allegedly captained the
 3 SHONAN MARU NO. 2 “during the 2009-2010 Southern Ocean whaling season”
 4 (3ACC ¶ 11), when the SHONAN MARU NO. 2 “rammed the ADY GIL” (*id.* ¶ 64).
 5 However, the allegations do not indicate or imply any involvement by Mr. Komura since
 6 that time. (*See generally id.*) Nonetheless, Defendants seek injunctive relief against Mr.
 7 Komura, at least as to their claims for piracy and unsafe navigation. (*Id.* ¶ 1; *see also id.*
 8 at 29 (asserting the freedom from piracy counterclaim against all counterclaim
 9 defendants), 31 (asserting the freedom of safe navigation counterclaim against all
 10 counterclaim defendants).) In light of Mr. Komura’s limited and bygone involvement
 11 with the actions alleged in Defendants’ counter-complaint, it appears unlikely that
 12 Defendants’ alleged imminent injury would be fairly traceable to Mr. Komura or that
 13 enjoining Mr. Komura would redress that injury.

14 Based on the foregoing, the court ORDERS Defendants to show cause within 10
 15 days on the following issues: (1) why the court should not dismiss all counterclaims
 16 against Mr. Komura for failure to serve; and (2) why the court should not dismiss all
 17 injunctive counterclaims against Mr. Komura for lack of standing.

18 //

19 //

20 _____

21 ¹¹ Because Article III standing implicates the court’s subject matter jurisdiction, the court
 22 is obliged to raise the issue *sua sponte*. *Bernhardt v. Cty of L.A.*, 279 F.3d 862, 868 (9th Cir.
 2002).

IV. CONCLUSION

2 For the foregoing reasons, the court DENIES Plaintiffs' motion to dismiss (Dkt.
3 # 304) and ORDERS Defendants to show cause within 10 days why the court should not
4 dismiss some or all counterclaims against Mr. Komura.

5 Dated this 13th day of June, 2016.



Jim R. Blit

JAMES L. ROBART
United States District Judge